Lim Hung Wang & Ors v Public Prosecutor

HIGH COURT (JOHOR BAHRU) — MISCELLANEOUS CRIMINAL APPLICATIONS NO 44–09 OF 2011
MOHD ZAWAWI SALLEH J
2 JUNE 2011

Criminal Procedure — Trial — Prima facie case — Whether court had power to review finding of prima facie case at end of prosecution's case — Accused alleged doubt as to identity of drug exhibits produced in court — Break in chain of handling of exhibits alleged — Whether appropriate for allegations to be raised during defence stage or on appeal after conclusion of case — Whether refusal of review caused miscarriage of justice — Whether exceptional circumstances shown to warrant review

The applicants were the accused in a drug trafficking case before the High Court, which, at the end of the prosecution's case, found that a prima facie case had been proved against them. Their defence was called pursuant to s 180(3)of the Criminal Procedure Code ('CPC') and dates were fixed for their evidence to be heard. However, before the defence could be heard, the applicants applied for the court to review its finding of a prima facie case. The applicants argued, inter alia, that there was doubt as to the identity of the drug exhibits in the case. They alleged the exhibits seized at the scene of commission of the offence differed from that sent to the chemist for analysis and that they had also been tampered with, raising doubt whether the exhibits produced in court were what were actually seized at the crime scene. They alleged there was a serious gap in the chain of evidence and in the chain of handling of the exhibits. The applicants submitted that the court had power to review its finding of prima facie case in exercise of its inherent powers conferred on it by s 25(1) of the Courts of Judicature Act 1964 ('CJA'), O 92 r 4 of the Rules of the High Court 1980 as well as by common law. The applicants argued that the finding of a prima facie case at the end of the prosecution's case was not a final judgment within the ambit of s 3 of the CJA, and for that same reason, the doctrines of functus officio and res judicata did not apply. The applicants said any finding made before the pronouncement of their guilt or innocence was reviewable. The respondent, however, submitted that there was no specific provision in s 180 of the CPC that allowed the court to review its finding of prima facie case. If the court allowed such review it would cause a 'tsunami' of similar applications at all levels of criminal courts. The prosecution also submitted that the court's common law inherent powers should only be exercised if it did not

conflict, or be inconsistent, with the provisions of the CPC and, in any case, only to prevent a miscarriage of justice.

Held, dismissing the application:

(1) The court had no power to review its own finding of prima facie case at the end of the prosecution's case. If the Legislature had intended to vest such power in the High Court, it would have been expressly so enacted in s 180(3) of the CPC in particular or Chapter XX of the CPC in general (see paras 34–35).

(2) Since the court's power to hear criminal cases was regulated by Chapter XX of the CPC, allowing inherent power to exceed such power would not only cause chaos to the administration of the criminal justice system but open the door to a number of applications in the course of criminal trials which would frustrate proceedings and bring them to a halt at all levels of criminal courts (see para 37).

(3) No miscarriage of justice would be occasioned to the applicants if the court did not review its finding of prima facie case because the applicants still had an avenue to raise the issues they had raised during the course of their defence (see para 48).

(4) The applicants failed to show any exceptional circumstances which would warrant the court to review its own finding. The court's power to review, if any, was not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or to provide a back-door method for them to reargue or relitigate their cases (see paras 43–44).

[Bahasa Malaysia summary

Pemohon-pemohon merupakan tertuduh di dalam kes pengedaran dadah di Mahkamah Tinggi di mana pada penutupan kes pihak pendakwaan, kes prima facie didapati telah dibuktikan terhadap mereka. Mereka dipanggil untuk membela diri menurut s 180(3) Kanun Acara Jenayah ('KAJ') dan tarikh-tarikh ditetapkan agar keterangan mereka didengar. Walau bagaimanapun, sebelum pembelaan didengar, pemohon-pemohon memohon agar mahkamah mengkaji semula dapatan kes prima facie tersebut. Pemohon-pemohon mendakwa, antara lainnya, bahawa terdapat keraguan mengenai identiti ekshibit dadah di dalam kes tersebut. Mereka juga mendakwa ekshibit-ekshibit yang dirampas di tempat kesalahan tersebut dilakukan berbeza dengan apa yang dihantar kepada ahli kimia untuk dianalisis dan bahawa ekshibit-ekshibit tersebut telah tercemar dan menimbulkan keraguan sama ada ekshibit-ekshibit yang dikemukakan di mahkamah adalah apa yang sebenarnya dirampas di tempat jenayah. Mereka mendakwa bahawa terdapat jurang yang jauh di dalam rantaian keterangan dan rantaian pengendalian ekshibit-ekshibit. Pemohon-pemohon menghujah

bahawa mahkamah mempunyai kuasa untuk mengkaji semula dapatan kes prima facie bagi melaksanakan kuasa sedia ada yang diberikan kepada mahkamah oleh s 25(1) Akta Mahkamah Kehakiman 1964 ('AMK'), A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 begitu juga dengan 'common law'. Pemohon-pemohon mendakwa bahawa dapatan kes prima facie di penutupan kes pihak pendakwaan bukanlah penghakiman akhir yang terangkum di dalam s 3 AMK, dan berdasarkan alasan tersebut, doktrin-doktrin 'functus officio' dan 'res judicata' tidak boleh digunakan. Pemohon-pemohon menyatakan sebarang dapatan dibuat sebelum pengumuman kebersalahan atau ketakbersalahan mereka boleh dikaji semula. Responden-responden, bagaimanapun, menghujah bahawa tidak terdapat sebarang peruntukan khas di dalam s 180 Kanun Acara Jenayah yang membenarkan mahkamah untuk mengkaji semula dapatan kes prima facienya sendiri. Sekiranya mahkamah membenarkan kajian semula tersebut, ia akan mengakibatkan 'tsunami' permohonan-permohonan sebegitu pada keseluruhan peringkat mahkamah-mahkamah jenayah. Pihak pendakwaan juga menghujah bahawa kuasa sedia ada 'common law' mahkamah hanya boleh digunakan sekiranya ia tidak bercanggah, atau menjadi tidak konsisten dengan peruntukan-peruntukan Kanun Acara Jenayah dan dalam mana-mana kes, hanya untuk mengelakkan ketidakadilan undang-undang.

Diputuskan, menolak permohonan:

(1) Mahkamah tidak mempunyai kuasa untuk mengkaji semula dapatan kes prima facienya pada penutupan kes pihak pendakwaan. Sekiranya badan perundangan berniat memberikan kuasa sedemikian kepada Mahkamah Tinggi, ia seharusnya digubal secara nyata di dalam s 180(3) Kanun Acara Jenayah terutamanya Bahagian XX Kanun secara umumnya (lihat perenggan 34–35).

(2) Memandangkan kuasa mahkamah untuk mendengar kes-kes jenayah tertakluk oleh Bahagian XX Kanun, dengan membenarkan kuasa sedia ada mengatasi kuasa tersebut bukan sahaja menyebabkan kucar-kacir di dalam pengurusan sistem keadilan jenayah tetapi juga membuka pintu terhadap sebahagian permohonan di dalam perjalanan perbicaraan-perbicaraan jenayah yang boleh mengecewakan prosiding-prosiding tersebut dan menghentikannya di semua peringkat mahkamah-mahkamah jenayah (lihat perenggan 37).

(3) Tiada ketidakadilan undang-undang yang berlaku terhadap pemohon-pemohon sekiranya mahkamah tidak mengkaji semula dapatan kes prima facie tersebut kerana pemohon-pemohon masih lagi mempunyai ruang untuk mengemukakan isu-isu yang ditimbulkan oleh mereka semasa pembelaan mereka dijalankan (lihat perenggan 48).

(4) Pemohon-pemohon gagal untuk menunjukkan sebarang keadaan luar biasa yang akan membolehkan mahkamah untuk mengkaji semula

dapatannya. Kuasa mahkamah untuk mengkaji semula, sekiranya ada, tidak dicipta bagi tujuan membolehkan pihak-pihak untuk meremedikan kegagalan atau peninggalan 'oversight' mereka semasa perbicaraan atau menyediakan kaedah pintu belakang kepada mereka untuk menghujah semula atau melitigasi kes-kes mereka (lihat perenggan 43–44).]

Notes

For cases on prima facie case, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5316–5333.

Cases referred to

Abasaheb Yadav Honmane v The State of Maharashtra and Anor (unreported)
Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors [2008] 5 CLJ 654, HC (refd)
Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1, FC (refd)
Bhamjee v Forsdick and others (No 2) [2003] EWCA Civ 1113 (refd)
Bremer Vulcan Schiffbau Und Maschinen Fasrik v South India Shipping Corpn [1981] 1 All ER 289; [1981] AC 909, HL (refd)
Chandler v Alberta Association of Architects [1989] 2 SCR 848 (refd)
Cocker v Tempest (1841) 7 M & W 502 (refd)
Connelly v Director of Public Prosecution [1964] AC 1254, HL (refd)
Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] CLJ 101 (Rep); [1983] 2 CLJ 10, FC (distd)
Dato' Seri Anwar bin Ibrahim v PP [1999] 1 MLJ 321, CA (refd)
Dato' Seri Anwar bin Ibrahim v PP [2004] 3 MLJ 517; [2004] 4 CLJ 157, FC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2011] 2 CLJ 845, CA (refd)
Hunter v Chief Constable of the West Midlands Police and others [1982] AC 529, HL (refd)
Husdi v PP [1980] 2 MLJ 80, FC (refd)
KTS News Sdn Bhd v See Hua Realty Bhd & Anor [2011] 3 CLJ 144, CA (refd)
Karpal Singh & Anor v PP [1991] 2 MLJ 544, SC (refd)
Letchumanan a/l Suppiah v PP and another appeal [2009] 5 MLJ 597, FC (refd)
Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor [2009] 2 MLJ 660; [2009] 2 CLJ 839, FC (refd)
Marzuki bin Mokhtar v PP [1981] 2 MLJ 155 (refd)
Pendakwa Raya lwn Nasrun Effendi [2008] 4 MLJ 272; [2009] 3 CLJ 388, HC (refd)
PP v Heng You Nang [1949] MLJ 285 (refd)
PP v Ng Lai Huat & Ors [1990] 2 MLJ 427, HC (distd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
R v Watson [1980] 2 All ER 293, CA (refd)

R v Duhammel [1984] 2 SCR 555 (refd)
Robinson (1990) 250 AR 201 (refd)
Saad bin Abas & Anor v PP [1999] 1 MLJ 129, CA (refd)
Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai [1997] 3 MLJ 281; [1997] 4 CLJ 70, HC (refd)
Simrikhia v Dolley Mukherjee & Ors [1990] 2 CLJ 731, SC (refd)
Taylor v Lawrence [2002] 3 WLR 640, CA (refd)
Zahira Habibullah H Sheik and Anor v State of Gujarat and Ors (2004) 4 SCC 158 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 3, 25(1), 67(1)
Criminal Procedure Code ss 3, 5, 180, 180(3), 278, 307(1), 323, Chapters XX, XXXI
Criminal Procedure Code [IND] ss 362, 482
Dangerous Drugs Act 1952 s 39B, 39B(1)(a)
Federal Constitution arts 121(1), (1B)
Penal Code s 34
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 O 53, O 92 r 4

Kitson Foong (Ahmad Zaidi bin Zainal, T Kumar and Rosal Azimin bin Ahmad with him) (Ahmad Zaidi & Partners) for the applicants.
Umar Saifuddin bin Jaafar (Deputy Public Prosecutor, Johor Legal Advisory Office) for the respondent.
Kamarul Hisham Kamaruddin (Hasnal Rezua Merican bin Habib Merican and Lim Guan Keng with him) (Kamarul Hisham & Hasnal Rezua) watching brief for the Embassy of Mexico, as amicus curiae.

Mohd Zawawi Salleh J:

INTRODUCTION

[1] This is an application by the applicants, the accused in the Criminal Suit No MT(3)-45–34 of 2008, for this court to review its own finding given on 25 February 2011 under s 25(1) of the Courts of Judicature Act, 1964 (Act 91) ('CJA'), s 5 of the Criminal Procedure Code (Revised 1999) (Act 593) ('CPC') and O 92 r 4 of the Rules of the High Court 1980 ('RHC').

[2] The application concerns an important question of law and of public interest. According to learned counsel for the applicants, courts in Malaysia

had not previously expressed any opinion on this issue.

FACTUAL CONTEXT

[3] To appreciate the controversy raised in the present application, few relevant facts may be noted:

(a) The applicants were jointly tried in the High Court of Johor Bahru on a charge for an offence of trafficking methamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) (Act 234) ('DDA 1952') and punishable under s 39B of the same Act to be read with s 34 of the Penal Code (Act 574) ('Penal Code').

(b) At the close of the case for the prosecution, this court, upon having evaluated the prosecution evidence on a maximum basis and having given anxious considerations to the submissions by all parties, held that the prosecution had proved a prima facie case against the applicants. With regard to the issue that there was doubt as to the identity of the drugs exhibits which formed the subject matter of the charge, the court found it is a fact that the drugs exhibits recovered by the enforcement officers was the same drug exhibits sent for analysis and subsequently produced in court as evidence. There was no break in the chain of evidence regarding the exhibits. The identity of the exhibits was well established.

(c) The applicants were called to enter their defence under s 180(3) of the CPC. The court has then fixed 27 until 29 April 2011 to hear their evidences;

(d) The applicants grounded their application on, inter alia, the following factual bases set out in the affidavit in support affirmed on 22 April 2011 by Ahmad Zaidi bin Zainal, one of the applicants' counsel:

> 7. bahawa terdapat pemutusan rantaian eksibit di dalam mana eksibit-eksibit yang telah diberi deskripsi kandungan dan dicam penandaan oleh SP-4 di tempat kejadian berbeza sama sekali daripada eksibit-eksibit yang telah diterima oleh SP-4 daripada SP-13 untuk tujuan analisa kimia dari segi diskripsi kandungan. Maka terdapat keterangan khusus dan jelas bahawa terdapat pemutusan rangkaian keterangan serta eksibit sebelum analisis kimia dilakukan oleh SP-4;
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> 8. bahawa terdapat keterangan pengakuan yang khusus dan jelas melalui saksi ahli kimia SP-4, bahawa eksibit-eksibit yang diterima dari Sp-13 untuk tujuan 'drug profiling' pada 18.9.2008 mempunyai kesan-kesan telah diganggu, tandaan dan bungkusan yang berlainan dari eksibit-eksibit yang telah dikembalikan oleh beliau kepada SP-13

sebelum itu pada 07.07.2008 di mana keterangan ini menimbulkan keraguan yang munasabah yang amat serius berkenaan rantaian keterangan dan eksibit;

9. bahawa terdapat keterangan pengakuan yang khusus dan jelas melalui saksi SP-13, pegawai penyiasat, mengesahkan bahawa sebahagian eksibit-eksibit yang telah diterima semula dari ahli kimia (SP-4) pada 07.07.2008 dan disimpan oleh SP-13 di dalam satu lokap polis di Jabatan Siasatan Jenayah Narkotik, Ibu Pejabat Kontijen Polis, Johor telah hilang dari simpanan dan menjadi perkara subjek satu laporan polis oleh SP-13 bertarikh 31.7.2008 dan sebahagian eksibit-eksibit yang kononnya dirampas dari tempat kejadian juga telah hilang dari simpanan di tempat kejadian dan menjadi perkara subjek laporan polis oleh SP-13 sendiri pada 20.8.2008;

10. bahawa oleh kerana keterangan-keterangan jelas berkenaan pemutusan rangkaian custody serta eksibit, terdapat keraguan munasabah yang amat serius berkenaan samada eksibit-eksibit dadah yang dikemukakan di mahkamah yang menjadi subjek pertuduhan terhadap Pemohon-pemohon/Tertuduh-tertuduh adalah eksibit-eksibit yang telah dirampas dari tempat kejadian;

11. Keterangan-keterangan yang khusus dan jelas dalam kes ini yang membuktikan pemutusan rangkaian keterangan berkenaan eksibit dan custody, menimbulkan suatu keraguan yang munasabah yang amat serius yang mana tiada sebarang juri atau 'trier of fact' yang munasabah akan memanggil pemohon-pemohon/Tertuduh-Tertuduh untuk membela diri;

ISSUES

[4] The two main issues to be decided are as follows:

(a) whether the High Court has the power to review its own finding on prima facie case at the end of the prosecution case; and

(b) should issue (a) be answered in the affirmative, whether there were errors in the decision of the court in calling the applicants to enter their defence.

THE APPLICANTS' SUBMISSION

[5] The argument for the applicants was presented by Mr Kitson Foong and with the leave of this court, Mr Kamarul Hisham, holding watching brief for the Embassy of Mexico, was invited to be the *amicus curie*.

[6] It is the submissions of learned counsel for the applicants and the *amicus curie* that this court has an inherent power to review its own prima facie finding at the end of the prosecution case. The bases of these contentions are on the

following two reasons:

(a) Inherent power

(i) This court is vested with statutory powers conferred by federal laws and inherent common law powers which are residuary or reserve powers. This inherent power is derived from s 25(1) of the CJA and O 92 r 4 of the RHC.

(ii) In support of this argument, learned counsel referred to the Federal Court case, *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, in which the majority decision were of the view that the court cannot override an express provision of the law. If there is no express provision in the statute, then the court can exercise its inherent common law powers in a suitable case by virtue of the existence of O 92 r 4 of the RHC where it serves as a reminder and confirmation of the aforesaid power in order to prevent injustice.

(iii) The finding made at the end of the prosecution's case is not final within the ambit of s 3 of the CJA which is not appealable. Therefore, this court could invoke its inherent power to review and revisit its earlier finding on prima facie case.

(iv) According to learned counsel, the only statutory bar with respect of the aforesaid power can only be found in s 278 of the CPC that is equipollent to s 362 of the Indian Criminal Procedure Code which is merely with respect to the final judgment. Thus, any finding made before the pronouncement of guilt or innocence of an accused could be reviewed (see *Public Prosecutor v Heng You Nang* [1949] MLJ 285 wherein Spenser-Wilkinson J had reviewed the meaning and principles enunciated in s 278 of the CPC).

(v) Reliance was placed on the following cases to support their submissions:

(a) *R v Watson* [1980] 2 All ER 293; and

(b) *Public Prosecutor v Ng Lai Huat* [1990] 2 MLJ 427

(b) The doctrine of functus officio and res judicata do not apply

(vi) Since the prima facie finding made by this court at the end of the prosecution case is not a final judgment, the doctrine of functus officio and res judicata do not apply to the present case. The issue of guilt or innocence of the applicants is still alive and is not finally disposed off and as such the doctrine is not applicable.

(vii) The *Oxford Companion to Law* (1980) at p 508 provides the following definition of functus officio:

> Functus officio (having performed his function). Used of an agent who has performed his task and exhausted his authority and of an arbitrator to whom further resort is incompetent, his function being exhausted.

(viii) It is clear that the principle of functus officio exists to allow finality of judgment from courts which are subject to appeal (see *Chandler v Alberta Association of Architects* [1989] 2 SCR 848, *Robinson* (1990) 250 AR 201, *R v Duhammel* (1984) 2 SCR 555 and *Pendakwa Raya lwn Nasrun Effendi* [2008] 4 MLJ 272; [2009] 3 CLJ 388).

(ix) Res judicata is defined in *Black's Law Dictionary*, (7th Ed) as follows:

> [Literally in Latin 'a thing adjudicated] 1. An issue that has been definitively settled by judicial decision. 2. An affirmative defence barring parties from litigating a second lawful lawsuit on the same claim, or any other claim arising from the same transactions and that could have been — but was not raised in the first suit. The three essential elements are (1) an earlier decision on the issue (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties. Restatement (Second) of Judgments ss. 17, 24 (1982) - Also termed res adjudicata, claim preclusion. Cf. Collateral Estoppel.
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> > 'Res Judicata has been used in this section as a general term referring to all new ways in which one judgment will have a binding effect on another. That usage is and doubtless will continue to be common, but it lumps under a single name two quite different effects of judgments. The first is the effect of foreclosing any litigation of matters that never been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have once been litigated and decided. The first of these, preclusion of matters that were never litigated, had gone under the name, 'true res judicata' or the names 'merger' and 'bar', The second doctrine, preclusion of matters that have once been decided, has usually been called 'collateral estoppel' Professor Alan Vestal has long argued for the use of the names 'claim preclusion' and 'issue preclusion' for these two doctrines *[Vestal, Raitonale of Preclusion, 9 St. Louis U LJ 29 (1964)]*, and this usage is increasingly employed by the Courts as it is by Restatement Second of Judgment. Charles Alan Wright, Law of Federal Courts s. 100A, at 722–23 (5th ed. 1994).

(x) George Spencer Bower and Sir Alexander Kingcome Turner in their book *The Doctrine of Res Judicata,* (2nd Ed) at p 1 defined res judicata, inter alia, as follows:

> 21 In English jurisprudence ares judicata, that is to say a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies.

(See also *Manoharan a/l Malayalam v Menteri Dalam Negeri, Malaysia & Anor* [2009] 2 CLJ 839).

THE RESPONDENT'S SUBMISSION

[7] In opposing this instant application, the learned deputy public prosecutor ('DPP') submitted that this court cannot review its own decision on the premise that there is no specific provision in s 180 of the CPC to confer such power on the High Court (see art 121(1) of the Federal Constitution). By doing so, it would cause a 'tsunami' of such an application being made at all levels of our criminal courts. In support of this contention, the learned DPP referred to several authorities (see *Shaik Zolkaffily bin Shaik Natar & Ors (sued as trustees of the estate of Sheik Eusoff bin Sheik Latiff, deceased) v Majlis Agama Islam Pulau Pinang dan Seberang Perai* [1997] 3 MLJ 281; [1997] 4 CLJ 70 and *Aras Jalinan Sdn Bhd v Tipco Asphalt Public Company Ltd & Ors* [2008] 5 CLJ 654).

[8] The learned DPP also pointed out that only r 137 of the Rules of the Federal Court 1995 allows for the Federal Court to review its own decision in limited circumstances. Such power is not even conferred to the Court of Appeal.

[9] With regard to the issue of applying the English common law when no special provision has been made by our CPC, the respondent submitted that it may only be applied as long as it does not conflict or be inconsistent with the provisions of the CPC.

[10] Be that as it may, the respondent urged this court to take into consideration of the peculiar circumstances prevailing in this country before applying the English common law as well as to ensure that such application of the inherent power is only when there is miscarriage of justice (see *Husdi v Public Prosecutor* [1980] 2 MLJ 80 and *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544).

FINDINGS OF THE COURT

[11] There are two main issues to be decided by this court. In answering the first main issue, the submissions advanced by both parties will be discussed in turn in separate headings as follows:

(a) Power of the High Court to review its own finding on prima facie case under the CPC.

(b) Inherent power of the court.

Power of the High Court to review its own finding on prima facie case under the CPC

[12] In our country, criminal procedure law is codified in the Criminal Procedure Code (Revised 1999) (Act 593) which controls the entire process of criminal procedure from the beginning ie with the commission of the offence to the conclusion of the judgment for that particular case.

[13] Section 3 of the CPC provides that all offences under the Penal Code shall be inquired into and tried according to the provisions of the Code, and all offences under any other law shall be inquired into and tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences. For the record, this includes the charge framed against the applicants in this case.

[14] This court has no hesitation to agree with the submissions of learned counsel that the doctrine of functus officio and res judicata do not apply and that the finding made by this court on prima facie case against the applicants at the end of the prosecution's case is excluded from the definitions of 'decision' under s 3 of the CJA which reads:

> decision means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[15] Even the Court of Appeal in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [1999] 1 MLJ 321 at p 335, had occasion to construe the meaning of the term 'decision' in s 3 of the CJA in this manner:

> A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.

[16] Further, in *Marzuki bin Mokhtar v Public Prosecutor* [1981] 2 MLJ 155, Tan Chiaw Thong J had this to say about the ruling made at the end of the prosecution's case:

> In my opinion a ruling made at the end of the case for the prosecution in a criminal trial that there is a case for the accused to answer on the charge or charges against him is not a judgment within the contemplation of s 307(1) of the Criminal

Procedure Code. In this connection, the word 'judgment' is not defined in the Code but in the commentaries on the Code of Criminal Procedure 1973 by Sarkar, in dealing with the matter of judgment in a trial under s 353 of the Indian Code of Criminal Procedure, it was stated at p 823 that the word 'judgment' in criminal proceedings indicates the final order in a trial terminating in the conviction or acquittal of the accused. I would respectfully adopt the definition of judgment therein defined for the purposes of the instant appeal. I would therefore hold that the instant appeal does not concern a judgment falling within the ambit of s 307(1) of the Criminal Procedure Code.

[17] In dealing with the matter of revision on its earlier finding made by this court, there is nothing in s 180 of the CPC explicitly provides such power.

[18] For ease reference, s 180 of the CPC is reproduced herein:

Section 180 Procedure after conclusion of case for prosecution.

(1) When the case for the prosecution is concluded, the Court *shall* consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court *shall* record an order of acquittal.

(3) If the Court finds that a prima facie case has been made out against the accused on the offence charged the Court *shall* call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction. (Emphasis added.)

[19] The decision by Lamin Mohd Yunus PCA in *Saad bin Abas & Anor v Public Prosecutor* [1999] 1 MLJ 129 (CA), is very clear on this point and it is still a good law and has been applied by the Federal Court in *Letchumanan a/l Suppiah v Public Prosecutor and another appeal* [2009] 5 MLJ 597 (FC). His Lordship had this to say at p 133:

A complete criminal trial involves both the case for the prosecution and the case for the defence. This is implied from the very charge itself. A charge accuses a person of having committed an offence. That suggests that he has to put up his defence. The moment the prosecution has proved its case meaning that the court has decided that there is a case for the accused to answer, the accused must therefore forthwith enter his defence. So it would be premature to question whether the decision calling for the accused to enter his defence was right and wrong. The proceedings must continue until the end of the case for the defence and only then would the court be able to finally decide the fate of the accused. On the other hand, if he is acquitted at the end of the case for the prosecution, that means that the court has decided the fate of the accused and that as far as that court is concerned, the accused is a free man.

> Similarly, when a High Court judge rules at the end of an appeal by the prosecutor in a case where the accused has been acquitted at the end of the prosecution case that the accused must enter his defence, it is as good as saying that the sessions court judge himself has decided to call for the defence assuming that he has analysed the case in the way that the High Court judge has done. Only after he has heard the defence can he finally decide the fate of the accused. (Emphasis added.)

[20] In the same vein, Abdul Malik bin Ishak JCA in the Court of Appeal's case *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 2 CLJ 845 said:

> In a criminal trial, the procedure is rather simple. At the end of the prosecution's case, if the trial court finds that there is a prima facie case against the accused, the trial court *has to call upon the accused to enter his defence*. The accused *is under obligation* to make his defence. (Emphasis added.)

[21] In the light of the above, it is my considered view that the CPC does not specifically gives any power to this court to review its own finding made pursuant to s 180(3) of the CPC. We shall now move on to the second submission advanced for the first main issue.

Inherent power of the court

[22] The next question to be posed is this: can this court review its finding since the particular provision is silent on such procedure by invoking its inherent power?

[23] Learned counsel for the applicants has argued a number of points on this issue. I do not think I do him injustice if I summarise his argument as follows:

(a) It is trite law that the court has an inherent jurisdiction to protect its process from abuse. This proposition was stated in *Cocker v Tempest* (1841) 7 M & W 502 in which Baron Alderson stated:

> The power of each court over its own process is unlimited; it is a power incident to all courts, inferior as well as superior; were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice.

(b) The principle was restated in *Connelly v Director of Public Prosecutions* [1964] AC 1254 at p 1301 per Lord Morris of Borth-Y-Guest:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent

in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

(c) The House of Lords also emphasised this point in *Hunter v Chief Constable of the West Midlands Police and others* [1982] AC 529 at p 536 where Lord Diplock said:

> This is a case about the abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people.

(d) The court's power may be unlimited but it is not unqualified; see eg the speech of Lord Diplock in *Bremer Vulcan Schiffbau Und Maschinen Fasrik v South India Shipping Corpn* [1981] AC 909 at p 977C—H:

> The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power inherent in its constitutional function as a court of justice. Every civilised system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.

The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' to exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice.

(e) In *Taylor v Lawrence* [2002] 3 WLR 640, Lord Woolf CJ (as he was then) at para 54 referred to Lord Diplock's speech in *Bremer Vulcan* as follows:

> Earlier judgments referring to limits on the inherent jurisdiction of this court must be read subject to this qualification. It is very easy to confuse questions as to what is the jurisdiction of a court and how that jurisdiction should be exercised. The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are here referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.

This reasoning was further endorsed by Philips MR in his subsequent judgment in *Bhamjee v Forsdick and others (No 2)* [2003] EWCA Civ 1113.

(f) Master IH Jacob in his paper, *The Inherent Jurisdiction of the Court* 1970 Current Legal Problems 23 at p 51, posited:

> In this light, the inherent jurisdiction of the court may be defined as being reserve or fund or powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[24] In the light of the above, learned counsel submitted that this court is permitted to draw upon the well of undefined powers which were available to court as part of its inherent power to review its own prima facie case at the end of the prosecution case.

[25] Learned counsel for the applicants submitted that the words in s 482 of the Indian CPC are in pari materia with O 92 r 4 of the RHC which places no limitation to the jurisdiction of this court to review its own decision or orders made in the course of trial. Section 482 of the Indian CPC provides as follows:

> Section 482 Saving of inherent powers of High Court
>
> Nothing in this Code shall be deemed to limit or effect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.

[26] However, it is pertinent to note that recourse to the inherent powers under s 482 of the Indian CPC would not be permissible if it defeats the

statutory character of other criminal provisions. These powers are to be exercised sparingly, with caution and to ensure that the principal objects stated in a particular section is satisfied as a condition precedent to the exercise of such powers. The legal maxim *lex nil frustra jubet* applies, which means that the law commands nothing vainly, so also orders of the court are not passed in vacuum or contrary to statute.

[27] M Fathima Beevi J in India Supreme Court's case *Simrikhia v Dolley Mukherjee & Ors* [1990] 2 CLJ 731 had this to say about the exercise power under s 482 of the Indian CPC:

> Learned counsel for the appellant contended before us that the second application under s 482 of the CPC was not entertainable, the exercise of power under s 482, on a second application by the same party on the same ground virtually amounts to the review of the earlier order and is contrary to the spirit of s 362 of the CPC and the High Court was, therefore, clearly in error in having quashed the proceedings by adopting that course. We find considerable force in the contention of the learned counsel. The inherent power under s 482 is intended to prevent the abuse of the process of the court and to secure ends of justice. Such power cannot be exercised to do something which is expressly barred under the Code. If any consideration of the facts by way of review is not permissible under the Code and is expressly barre, it is not for the court to exercise its inherent power to reconsider the matter and record a conflicting decision. If there had been change in circumstances of the case, it would be in order for the High Court to exercise its inherent powers in the prevailing circumstances and pass appropriate orders to secure the ends of justice or to prevent the abuse of the process of the court. Where there is no such changed circumstances and the decision has to be arrived at on the facts that existed as on the date of the earlier order, the exercise of the power to reconsider the same materials to arrive at different conclusion is in effect a review, which is expressly barred under s 362.

[28] In another Indian case, *Abasaheb Yadav Honmane v The State of Maharashtra and Anor* (unreported), Swantanter Kumar CJ on 12 March 2008 held this:

> 13 The inherent powers of High Court under s 482 of the court, cannot be exercised in regard to matters specifically covered by the other provisions of the Criminal Code;

[29] In Malaysia, it is only the Federal Court which is provided with the power to review its own decision. This is enunciated in r 137 of the Rules of the Federal Court 1995 and it is only applicable under limited circumstances.

[30] In *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2004] 3 MLJ 517; [2004] 4 CLJ 157, Alauddin Mohd Sheriff FCJ (as he then was) said at p 544 (MLJ); p 193 (CLJ):

Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; [2001] 4 CLJ 61 and *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673; [2002] 3 CLJ 577. However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of r 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating r 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

[31] Zaki Tun Azmi PCA (as he then was) in *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, had explained the jurisprudence of inherent jurisdiction in a specific subheading when he said:

Inherent Jurisdiction

[36] What then is the meaning of inherent jurisdiction? According to the *Concise Oxford Dictionary*, 'inherent' means 'existing in something, esp as a permanent or characteristic attribute'. In the context of the law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute.

[37] *Halsbury's Laws of England*, (4th Ed) in Vol 37 at para 12 refers to 'inherent jurisdiction' as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[38] In *Bremer Vulcan Schiffbau Und Maschinen Fasrik v South India Shipping Corpn* [1981] 1 All ER 289 at p 295, Lord Diplock speaking on the subject of dismissing a pending action for one of prosecution said:

> The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an 'inherent power' the exercise of which is within the 'inherent jurisdiction' of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs *must have power to do in order to maintain its character as a court of justice*. (Emphasis added.)

[32] In *KTS News Sdn Bhd v See Hua Realty Bhd & Anor* [2011] 3 CLJ 144, Low Hop Bing JCA upon deliberation on the meaning of 'review' had this to say:

> [26] In our view, the conferment of 'review jurisdiction' is not by way of inherent powers. Such review jurisdiction must be expressly provided by statute. Authorities abound in support of this proposition. Illustrations are found in:
>
> (a) *Harbhajan Singh v Karam Singh* AIR (53) 1966 SC 641: At p 642 Ramaswami J held that the court's power to review must be given by statute.
>
> (b) *Drew v Willis* [1981] 1 QB 450: Lord Esher MR pointed out that no court has a power of setting aside an order which has been properly made, unless it is given by statute.
>
> (c) *Anantharaju Shetty v Appu Hegade* AIR 1919 Mad 244. Seshagiri Aiyar J of the Madras High Court opined:
>
> It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by statute. Prima facie a party who has obtained a decision is entitled to keep it unassailed, unless the Legislature had indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least good reason for saying that such power should not be exercised unless the statute gives it, …
>
> (d) *Trilok Singh v State Transport Authority, Bihar* AIR 1985Patna 87: At p 88, Ashwini Kumar Sinha J said that it is well settled that the power of review is not an inherent power but is created by statute and expressly conferred by the statute. The power of review has always been held to be a creature of statute.
>
> (e) *Fernandes v Ranganayakulu* AIR 1953 Mad 236: At p 237 Ramaswami J echoed the same sentiment when he said that so far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power, but such a right must be conferred by statute.

[33] One cannot help but notice that the above said authorities dealt with the finality of decision or judgment. However, regard shall be made that if the application of review jurisdiction is strictly exercised in the case of final judgment and/or decision, what more in any finding or ruling by this court to call the applicants to enter upon their defence at the end of the prosecution case?

[34] In spite of best efforts by learned counsel, this court is unable to persuade itself to hold that the court has the power to review its own finding or decision on prima facie case at the end of the prosecution case.

[35] The word 'review' in the context of the High Court jurisdiction has been expressly enacted in Chapter XXXI of the CPC in respect only the finding, sentence or order recorded or passed by the subordinate court and as to the regularity of any proceeding of the same court (see s 323 of the CPC). Hence, should the Legislature intended to vest the power to review in the High Court upon calling the accused to enter defence, the same should have been expressly enacted in s 180(3) of the CPC in particular or Chapter XX of the CPC in general.

[36] An illustration of the above proposition that review jurisdiction must be expressly provided by statute is to be found in our rules of court. The word 'review' in the context of 'judicial review' has been expressly enacted in O 53 of the Rules of the High Court 1980, in which case, the jurisdiction by way of judicial review is clear and unambiguous. The absence of the word 'review' in art 121(1B), s 67(1) and O 92 r 4 means that no review jurisdiction has ever been conferred upon this court when it was created in 1994.

[37] Since the power of this court to hear criminal cases is regulated by Chapter XX, by allowing inherent power to exceed such power would not only cause chaos to our administration of criminal system but also would open the door to a number of applications in the course of criminal trials which could frustrate criminal proceedings and bring proceedings at all levels of our criminal courts to halt. This consequence is clearly undesirable. The proper time to take the points as contained in the affidavit in support of the application is upon appeal after the court had determined the guilt or innocence of the accused at the end of the entire case.

[38] So much has been said by learned counsel about 'fair trial'. It is important to emphasise that a fair trial included due regard being had not only to the accused persons but to the family of the victim and to society at large.

[39] The concept of a fair trial was eloquently dealt with by Justice Arjit Pasayat in *Zahira Habibullah H Sheik and Anor v State of Gujarat and Ors* (2004) 4 SCC 158 (decision on 12 April 2004) as follows:

> The concept of fair trial entails familiar trangulation of interests of the accused, the victim and the society in general. Interest of society is not to be treated completely with disdain and as *persona non grata*. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice — often referred to as the duty to vindicate and uphold 'the majesty of the law' … It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning Nelsons's eyes to the needs of society at large and the victims or their family members and relatives. (at pp 6 and 8)

[40] I now turn to the cases cited by learned counsel to support their submissions. The facts of the cases referred to by learned counsel are a long way from the present case and could be distinguished. The applications for review by parties in those cases or review by the court on its own motion concerned only the admissibility of evidence:

(a) *R v Watson* [1980] 2 All ER 293
This case concerns oral admissions and two written statements by the appellant. The relevant ruling and remarks of the court could be found in the head note at p 293:

> Because a judge retains control over the evidence to be submitted to the jury throughout a trial, he is not precluded, by the fact that he has already ruled at a trial within a trial in the jury's absence that a written statement by the accused is admissible in evidence as being voluntary, from reconsidering that a ruling at a later stage of the trial if further evidence emerges which is relevant to the voluntary character of the statement, and from ruling in the light of that evidence that the statement is not admissible.

(b) *Dato Mokhtar bin Hashim v Public Prosecutor* [1983] 2 MLJ 232
In this case the defence team had applied to the court for review of the question of voluntariness of Rahmat Satiman's cautioned statement, the evidence of Sudin (PW22) and the evidence of Datin Norsiah (PW23) in the light of another new evidence in the form of testimony of Batumalai (DW10), ASP Ibrahim (DW23), the testimony of YB Mohd Salleh (DW14) and the RTM film (D125). However, upon reconsideration, the court was of the view that 'the so called new evidence' does not alter the position.

(c) *Public Prosecutor v Ng Lai Huat* [1990] 2 MLJ 427
In this case, the court on its own initiative reviewed its earlier ruling on the admissibility concerning the demand of Jimmy Chua. Upon such reconsideration, the court reverses its earlier ruling and ruled that those purported demands are inadmissible for being hearsay. His Lordship concluded that the evidence is inadmissible for being hearsay thus concluding that the prosecution had not proved their case beyond reasonable doubt.

[41] The court does not see how the above decisions can be of any help to learned counsel's contention. The situation here is totally different.

[42] In the present application, on the other hand, the applicants are applying for the court to review its own finding after the court had considered in great detail all of the prosecution's evidence in establishing a prima facie case had been made out against the applicants at the end of the prosecution case. The grounds set forth in the affidavit of Ahmad Zaidi Zainal, affirmed on 22

April 2011 did not even indicate any emergence of new or further evidence which is relevant for the court to review its finding, should if it was allowed. They are contending that there is a serious gap in the chain of handling the exhibits before they had been handed over to the chemist, SP4, on which this court, upon maximum evaluation on the prosecution evidence, was satisfied that the exhibits have not been altered, substituted or contaminated prior to analysis by the chemist, in which it would affect the result of the analysis.

[43] Further, learned counsel did not indicate where the court could have erred in making such finding. The burden rests upon the applicants to demonstrate the exceptional circumstances which warrant this court to review its own finding. To my mind, exceptional circumstances include:

(a) discovery of a new fact not known by the court at the time it made the original decision;

(b) emergence of new evidence which could have a decisive factor in reaching the original decision;

(c) a material change in circumstances since the original decision; and

(d) a reason to believe that the original decision was erroneous or constituted an abuse of power that resulted in an injustice.

[44] The court's power to review, if any, is not designed for the purpose of allowing parties to remedy their own failing or oversights during trial or to provide a backdoor method by which the parties can seek to reargue or relitigate their cases.

[45] On the issue of reargument or relitigation, it is useful to rely on the dicta of Eusoffe Abdoolcader FJ (as he then was) in *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] CLJ 101 (Rep); [1983] 2 CLJ 10; where the learned judge said (at p 271):

> This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in of the *West Midlands Police & Ors* [1982] AC 529 (at p 542) which was applied by this court in *Tractors Malaysia Bhd v Charles Au Yong* [1982] CLJ (Rep) 355; [1982] 1 MLJ 320 (at p 321 (MLJ)).

[46] It is pertinent to note that in essence, the applicants are asking this court to use its inherent power to review all the issues complained of in the affidavit in support of the application on its merits notwithstanding that all these issues have been comprehensively dealt with and decided on its merits by this court. The issues raised in the affidavit in support are matters that could have formed

A the basis of grounds of appeal in the decision of the court at the end of the whole case if the decision is not in the applicant's favour.

[47] Be it as it may, since the court answered the first main issue in the negative, it is not necessary for the court to determine the second main issue.

B

[48] This court does not agree with the submission of learned counsel that there will be a miscarriage of justice if it does not review its own finding at the end of the prosecution's case in the circumstances of this instant case. This is because the applicants still have an avenue to raise the issue during the course

C of their defence.

[49] As a result, there can be no reason, let alone sufficient reason, which can properly be advanced to permit this court to review its own finding.

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[50] The application, therefore, fails and is dismissed.

Application dismissed.

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Reported by Ashok Kumar

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